

¹ P.H. Trans. (Apr. 7, 2014) at 5.

ISSUES

The ALJ granted medical treatment, ordering respondent and its insurance carrier to provide it with Dr. Robert Stringer until further order or until claimant reaches maximum medical improvement. Temporary total disability compensation was also ordered paid at \$117.67 per week beginning April 13, 2013, until further order or until claimant reaches maximum medical improvement or is returned to a comparable wage, whichever is first.

Respondent appeals, arguing claimant is not entitled to compensation as she forfeited her right to benefits when she refused to submit to a chemical test at respondent's request under K.S.A. 2012 Supp. 44-501(b)(1)(E). Respondent requests the Board reverse the ALJ's Order and Order Nunc Pro Tunc. Respondent acknowledges this is an otherwise compensable claim except for the issue dealing with the allegation claimant refused to submit to a drug test.

Claimant argues that respondent did not request and she did not refuse a drug test. Therefore, the ALJ's Order should be affirmed.

The issue on appeal is: Did claimant forfeit her right to workers compensation benefits under K.S.A. 2012 Supp. 44-501(b)(1)(E) for refusing to submit to a chemical test at the request of her employer?

FINDINGS OF FACT

Claimant began working for McDonald's in 2007. Claimant suffered injury from an accident on April 12, 2013. Claimant's pelvic bone and tailbone on her right side were fractured after she slipped and fell coming out of the walk-in refrigerator. Claimant testified that the floor had been wet from the sewer backing up and she had been going around it, but the floor and her shoes were still wet. Claimant had a bucket full of salad mix in her hands when she fell. She sat the floor for a few minutes after she fell, and then had to have help getting up.

Once claimant was helped up she went to the back room to see Ryan, the shift manager, so that she could fill out an accident report. Claimant was asked if she needed to go to the hospital, but declined the offer. She was instructed that, should she change her mind and decide to see a doctor, she needed to call and let respondent know. Claimant testified that, at the time, all she wanted was to go home and get out of her wet clothes.

After the fall, claimant had throbbing in her right leg and her balance was wobbly. Claimant's husband picked her up from work and took her home. Claimant did not work the remainder of her shift that day. Claimant's symptoms continued to get worse, despite the application of an ice pack. The next day she couldn't move. At that point, claimant's husband insisted she go to Via Christi Hospital because he could see she was in a lot of

pain. Claimant was not scheduled to work again until Monday. Before claimant left for the hospital on April 13, 2013, she called respondent, as instructed by her manager, and notified him that she was going to the hospital. Claimant's husband took her to the hospital, where she was given a pain shot and x-rays were taken.

The x-rays showed claimant had a fractured pelvis. She was told she would be bedridden for at least six to seven weeks. There was a question as to whether she would heal due to her age. Claimant testified that she does not remember being asked to submit to a drug test by respondent. She testified she was pretty out of it.

Claimant has not talked with anyone from respondent since the accident and, according to her, has not been asked to submit to a drug test. Claimant testified the only thing she remembers is going to the hospital on April 13, 2013, using crutches, getting x-rays and being told she had a pelvic fracture. She testified to being honest with the hospital staff and that her husband would know more about what happened at the hospital than she would.

Claimant claims no one at the hospital talked with her about submitting to a drug test. She indicated the only person she spoke with was a nurse that came in to give her a pain shot. Claimant doesn't remember how long she was at the hospital. When asked for her reason for not submitting to the drug test, claimant testified she was never asked to submit to one. The medical records for Via Christi Hospital suggest claimant informed them she had smoked marijuana. Claimant denies doing drugs and doesn't recall reporting she smoked marijuana. She does admit smoking cigarettes. There is no real evidence of whether she did or did not smoke marijuana as no drug test was ever performed. Claimant testified the only thing she used for her pain was two Excedrin and an ice pack. She denies using marijuana to control her pain.

Claimant was given medication for the pain which was recorded at an intensity of 10 on a scale of 1-10. Also included was a notation by Brenda Robertson, RN. The notation states when she came in to dismiss claimant and give discharge instructions, claimant's husband refused to allow claimant to submit to a drug screen because respondent did not send claimant for treatment the day of the accident. The reason for the drug screen was explained to claimant and her husband, but he continued to refuse to allow the drug screen and they left the hospital.

Respondent's crew orientation handbook specifically states: "Immediately report all injuries and illnesses, regardless of how minor. Any employee that is injured on the job will be drug-tested at the time of medical treatment. **Any employee that tests positive on the drug-test will be responsible for any medical costs and will NOT be covered under Nichols Management, Inc. d.b.a. McDonald's Workers Compensation Policy.**"²

² P.H. Trans. (Sept. 27, 2013), Resp. Ex. A at 12.

Claimant signed the signature page of the handbook indicating she read and understood the rules and policies within the handbook and agreed to comply.

Claimant testified she didn't understand what her signature meant when she signed the Crew Orientation Handbook, which contains respondent's policies and rules. Claimant indicated she was unaware that the employee handbook included a drug testing policy. And that information was not relayed to her when she notified respondent that she was going to the hospital. Claimant indicated she was not aware the hospital wanted to do a drug test while she was there and she had no idea that one had been recommended.³ Claimant alleges she remembers nothing about her time at the hospital except the pain, receiving a shot and going home.

Claimant had another x-ray, seven weeks after the first one and there was evidence of healing, but not properly due to fatty tissue around the bone. It was suggested she undergo physical therapy. She began physical therapy on June 3, 2013. Claimant has 40 percent use of her right leg, and she can now use a cane instead of crutches. It was recommended she meet with an orthopedic specialist.

Claimant has not been back to work since the accident and no one had contacted her to check on her. This made her very upset. Claimant denies any prior injuries and testified that before the accident she would walk a mile a day and now she can't even walk two blocks.

John Nolan, claimant's husband, learned of claimant's injury when he picked her up from work. He testified claimant told him she slipped and fell, hurting her butt, and wanted to go home. He didn't think that was a good idea, but did as she asked. He had no contact with anyone from respondent regarding the accident. He believed that she needed to go to the hospital.

When claimant got home, she was unable to get comfortable sitting or laying down. By the next day, she couldn't walk. He testified no one from respondent contacted claimant about taking a drug test because of the accident. Mr. Nolan took claimant to the hospital because she couldn't move.

Mr. Nolan indicated his experience with claimant being injured while in respondent's employment has not been a positive one. Claimant had a rotator cuff injury and an injury to a finger, with respondent taking a year to provide treatment for the shoulder and claimant being forced to obtain care for the finger on her own. Mr. Nolan did not want to take claimant straight home after he picked her up from work because he didn't want her injury to be forgotten and get worse like her shoulder injury. But claimant insisted they go home. Claimant did not resist going to the hospital the next day when she could not move.

³ *Id.* at 18.

Mr. Nolan testified that even after he got claimant home from the hospital, respondent still did not call claimant to request a drug test. He contends claimant never refused to take drug test. He testified respondent should have insisted claimant go to the hospital on the day of the accident, but they didn't because they knew the working conditions were not safe and they didn't want anyone to know.

Mr. Nolan testified that before taking claimant to the hospital he contacted respondent to report he was taking claimant in. He spoke with the shift manager and left word for Heather, the manager on call. Heather never returned the call. Mr. Nolan testified respondent did not inform him that claimant was going to need to take a drug test. He did admit that he was away from claimant's room for about 30 minutes. The first they learned of a drug test was when someone from occupational health came in to take claimant for a drug test.

When the individual from occupational health came in to take claimant for the drug test, Mr. Nolan told him claimant was not going to submit to the testing and he took claimant home. Mr. Nolan testified claimant was very upset and crying. He stated he himself was devastated and could hardly keep his composure. He stated that the report of claimant's pain being a 10 out of 10 was an understatement of her level of pain. He testified he told the person from occupational health that there had been no request from McDonald's for a drug test and they needed to contact claimant about it. Mr. Nolan testified claimant never refused to take the drug test. He stated that claimant is afraid of drugs and almost overdosed on morphine during childbirth.

Mr. Nolan testified he has no idea who Brenda Robertson is, but he does recall a conversation with two people at the hospital about there not being a request from respondent for claimant to take a drug test. He was extremely upset when he learned claimant had a fractured pelvis. He was frustrated that respondent had not sent her to the hospital the day of the accident.

Mr. Nolan testified he didn't know respondent had a drug testing policy and that there was no reason claimant couldn't have taken the test if it were requested. He stated no one ever told him respondent requested claimant take a drug test, they simply came in and indicated one was needed.

Chuck Nickle, an occupational health tech for Via Christi Hospital in Pittsburg, testified one of the tasks of his job is to administer drug tests. He testified the hospital does pre-employment, post-accident and random drug tests for several companies in the community.

Mr. Nickle testified that drug tests are not administered just because someone has a work injury. Some companies require drug tests in the event of a work accident. When this occurs the injured employee is accompanied by a representative of the company and someone comes in to administer the test. An employer can get on a list for automatic

testing by calling occupational health and setting up protocols for what they want, such as preemployment testing or post accident testing. Post-accident testing is completed upon request. Mr. Nickle testified McDonald's is on the list for automatic testing. There was no phone call, no email, and no letter requesting the drug screen. It was a standing request for all work accidents with McDonald's.

Mr. Nickle testified he is familiar with claimant's case, or more specifically, her husband. He remembered interacting with claimant on April 13, 2013, when he was called to the ER to administer a drug screen. Mr. Nickle testified when he entered the room, claimant was attempting to sit on the bed and it was clear she was in pain. He testified he explained his reason for meeting with claimant. After that, claimant's husband turned hateful and said there would be no drug screen, that McDonald's had not sent claimant out and they were not going to pay for the testing. He acknowledged claimant did not personally refuse the drug screen.

He testified that claimant acknowledged him by looking at him when he came into the room and announced his purpose. He agreed claimant never said anything. She was not given the opportunity to say anything, because claimant's husband refused any testing, so Mr. Nickle left. Mr. Nickle informed claimant and her husband that the drug screen was requested by the company. He believed claimant understood what was going on, as she nodded every time he was speaking. However, she was unable to get a word in because her husband was talking over her and wouldn't let her speak. There was no company representative with claimant when he came in for the drug screening. Mr. Nickle acknowledged he did not know the condition of claimant's injuries and certainly did not know her pain level. Mr. Nickle agreed claimant never actually refused to take the drug screen.

Pamela McClure, a Registered Nurse for Via Christi, didn't remember claimant's name, but does recall the incident where claimant refused a workers compensation drug screen. She also recalls that during triage questioning, claimant admitted to smoking "pot" the night before because she was trying to treat her pain.⁴ Ms. McClure indicated the first question in triage pertains to alcohol use, which claimant denied. She testified that no one from respondent contacted her about a drug screen for claimant and that usually occupational health takes care of that. She went on to state because claimant admitted to smoking "pot" there would have been no reason for her to refuse a drug screen.

Brenda Robertson, a Registered Nurse for Via Christi, testified she doesn't remember the exact date she met claimant, but she recalls claimant coming in because of a fall. Claimant had been diagnosed with a fractured pelvis. Ms. Robertson was responsible for claimant from 2:00 p.m. to 3:30 p.m., when claimant was discharged.

⁴ McClure Depo. Ex. 1 at 9.

Ms. Robertson gave claimant a shot of pain medication and claimant was responsive during this interaction. Shortly after, claimant was dismissed. She testified that when claimant was told about the fractured pelvis and that she was being released, claimant's husband appeared really upset. She decided the doctor should come in and talk with them before claimant left. After the doctor left the room, Ms. Robertson told claimant and her husband that, because this was a workers compensation case, a drug screen would need to be done and that occupational health had been contacted to take care of that. At this point, claimant's husband stated claimant would not be completing the drug screen and that McDonald's should have allowed claimant to come to the hospital the day before. Ms. Robertson tried to explain that the drug screen was necessary because this was a workers compensation claim and there were rules to follow. But, claimant and her husband chose to leave.

Ms. Robertson testified that while she was explaining everything to claimant and her husband, claimant was laying in the bed, listening and acting pretty passive. Mr. Nolan was doing most of the talking and was the one who refused the drug screen. Claimant never voiced that she would not do the screen. But she didn't volunteer to do it either.

Ms. Robertson explained that if there is a contract with a company, a drug screen is done for every work-related injury. She indicated occupational health keeps track of who has a contract and who doesn't. They are contacted when someone comes in with a work injury, so that they can check for a contract and then administer the screening. She tried to explain that claimant might get stuck with the bill for treatment if they did not do the screening. But Mr. Nolan continued to refuse, saying it didn't matter because they were going to sue anyway. There was no indication whether claimant wanted to do the drug screen, but her husband wouldn't let her.

Ms. Robertson indicated that no one from McDonald's came to the ER to see about claimant and no one called or emailed to specifically ask for a drug screen. She didn't know which McDonald's claimant worked for, nor did she know whether there was a contract regarding their drug testing policy. However, she assumed there was one because when she called occupational health they sent a representative out to complete the drug screen. When they called and talked to Mr. Nickle, he verified McDonald's was on their list of companies requiring the test.

Brittany McDonald works in Human Resources (HR) for Nichols Management. She has worked for Nichols Management for two years. She testified that Nichols Management owns McDonald's stores. Her job involves handling the insurance end of employee and customer accidents and unemployment claims. She contacts local hospitals to let them know the policies related to workers compensation claims for the company.

Ms. McDonald testified that on April 27, 2012, she contacted Via Christi Hospital and put in a standing order that a drug screen be completed for any McDonald's workers who claim an on-the-job injury. Ms. McDonald acknowledged she never spoke with claimant

about doing a drug screen following her injury and she didn't know if anyone else talked with claimant about it. However, claimant was aware of the policy as it was in the handbook.

Jessica Jones, shift manager at the North Pittsburg McDonald's, it was her understanding in April 2013, that for any accident the injured must go the hospital and get a drug screen. She indicated this policy was stated in the company's handbook and was distributed to the employees. Each employee had to read and sign. It is part of her job to make sure all of the employees read and sign, but she could not say for sure if she was present when claimant received, read and signed her revised handbook.

She testified that one of the employees, Juliana, who was covering the runner position on April 13, 2013, took a call from Via Christi asking about drug screening. She responded they are required for work incidents. Ms. Jones did not specifically ask claimant to take a drug test. She also indicated claimant did not tell Ms. Jones that she was refusing to take a drug test.

Juliana Tindell, assistant manager for the North Pittsburg McDonald's, testified she received a call from Via Christi Hospital regarding claimant and her injury and whether a drug test needed to be done. She checked with Jessica in the office and then replied yes. Ms. Tindell testified she did not speak with claimant about taking a drug test, and claimant never told Ms. Tindell that she was refusing to take a drug test.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(a)(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-501(b)(1)(E) states:

(E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation

act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes postinjury testing.

In the Order, the ALJ provided a detailed analysis of the meaning of "refusal". In doing so, the ALJ considered the Board's prior decision in *Seybold*.⁵ This Board Member finds the analysis of the ALJ, based upon the Board's prior decision, to be supported by this record and adopts same. This record does not support a finding that claimant "refused" to submit to a chemical test after a request by the employer.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. The record does not support a finding that claimant refused to submit to a chemical test after the accident on April 12, 2013.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated April 10, 2014, is affirmed.

⁵ *Seybold v Simplex Grinnell*, No. 1,067,611, 2014 WL 889883 (Kan. WCAB Feb. 18, 2014).

⁶ K.S.A. 2013 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of June, 2014.

HONORABLE GARY M. KORTE
BOARD MEMBER

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